SUPERIOR COUR OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Advocates for Justice and Education, Inc.	:	**Case Number: 2022 CA 3436 B**
Plaintiff,	:	
v.	:	**Judge: Danya A. Dayson**
	:	
DC.	:	
Defendant.		

AMENDED ORDER

Before the Court is Plaintiff's Motion for Partial Summary Judgment ("Motion") filed on July 17, 2023. Upon consideration of the motion, the opposition, the reply, the supplemental briefings submitted, the record herein, good cause having been found, and for the reasons explained herein, the Plaintiff's Motion for Partial Summary Judgment is granted in part.

BACKGROUND

This matter stems from Plaintiff's Amended Complaint ("Complaint") filed on June 1, 2023. The Complaint seeks declaratory and injunctive relief under the District of Columbia's Freedom of Information Act (FOIA). *See* Compl. at 1. Specifically, Plaintiff, Advocates for Justice ("AJE"), seeks to "compel the Defendant ("District of Columbia" or "the District") to produce and post certain letters of resolution issued by the DCPS Comprehensive Alternative Resolution and Equity (CARE) Team and the policies and guidelines used to adjudicate claims and grievances submitted to the CARE Team." *Id.* Plaintiff acknowledges in its Complaint the request would require disclosure of personal information and seeks the redacted versions of these letters of resolution ("LOR"). *Id.* at 2. The Plaintiff is a "federally designated Parent Training and Information Center for the District of Columbia." *Id.* at 3.

The Plaintiff previously submitted a FOIA request on October 28, 2021. *Id.* at 3. The request sought

1) [r]ecords or letters reflecting the determination or resolution of all complaints or grievances filed with the CARE Team since January 1, 2016;
2) [a]ll documents reflecting the resolutions, conclusions and outcomes of investigations by the CARE team;
3) [a]ll policies, guidelines, handbooks, manuals, or other documents used to adjudicate, determine or resolve the CARE Team complaints or grievances filed since January 1, 2016; and
4) [a]ll records that reflect or concern the number of complaints or grievances filed with the CARE team each calendar year beginning January 1, 2016, including 2021, and the number of such complaints or grievances dismissed without decision, pending and decided at the end of each calendar year beginning December 31, 2016, and including 2021 to date.

Id. at 4.

On July 17, 2023, Plaintiff filed their Motion for Partial Summary Judgment. An opposition was filed on August 22, 2023, and a subsequent reply was filed on August 29, 2023. Per the Court's oral order on October 19, 2023, the parties submitted supplemental briefings updating the Court on the issues that stand today. The Defendant filed their brief on November 15, 2023, and the Plaintiff responded on November 21, 2023.

In their memorandum, the District argues they are in compliance with D.C. Code § 2-536 since "DCPS posted the 41 LORs on its website." Def. Supp. Brief at 2. Furthermore, they have posted the CARE Team's Policies and Guidelines "except for Power Points and other internal training guidance." *Id.* at 3. They argue that "Power Points and other internal training are guidance documents and not mandated for proactive disclosure given they are mere summaries and representation of already-existing interpretations of DCPS policy and applicable law." *Id.* Finally, the District contends they have produced all records required under FOIA. *Id.* at 4. In contrast, the Plaintiff's reply argues the District has not produced all the LORs under the FOIA request and the policy and guidelines documents withheld must be proactively posted to be in compliance with D.C. Code § 2-536. *See* Plaintiff's Supp. Reply at 2, 5.

LEGAL STANDARD

Rule 56(a) of the Superior Court Rules of Civil Procedure provides in relevant part, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56(a).

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted). "Summary judgment may have once been considered an extreme remedy, but that is no longer the case," and indeed District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted).

"[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and citation omitted). In addition, a party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Id.* (quotation and citation omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted).

Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial. *See generally* Super. Ct. Civ. R. 56(c). Rule 56(c)(1) provides:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Super. Ct. Civ. R. 56(c)(1). Rule 56(c)(2) further provides, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Super. Ct. Civ. R. 56(c)(2). Rule 56(c)(4) provides, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Super. Ct. Civ. R. 56(c)(4).

Under Rule 56(e)(2) and (3), the Court may, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)," "(2) consider the fact undisputed for purposes of the motion [or] (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Super. Ct. Civ. R. 56(c)(e)(2)-(3). Depending on the factual and legal context, a party's "failure to explain the basis for [a] claim in opposing summary judgment constitutes a waiver of that claim." *Hodgson v. Nat'l Council of Senior Citizens*, 766 A.2d 54, 58 (D.C. 2001); *see Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1125-26 (D.C. 2004) (holding that failure to file affidavit required by Rule 56 waives claim that trial court should have deferred ruling to allow further discovery).

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Ave., LLC*, 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009).

ANALYSIS

I. Since the District concedes the LORs are subject to proactive disclosures, all LORs must be posted, separate and apart from Plaintiff's FOIA request.

Under D.C. Code §2-536,

> the following categories of information are specifically made public information, and do not require a request for written information: . . .
>
> **3)** [f]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; . . .
>
> **(5)** [c]orrespondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party.
>
> D. C. Code § 2-536 (a)(3), (5).

The District argues they have complied with the code since they "posted the 41 LORs" that were requested by AJE. *See* Def. Supp. Brief at 2. The District received an email from Plaintiff it suggests adjusted Plaintiff's initial FOIA request from 88 LORs to 41 LORs. *Id.* However, AJE argues their email to the District simply requested a "representative sample of LORs." *See* Plaintiff's Supp. Reply at 3. Furthermore, in their supplemental brief, the "District conceded the CARE team's LORs are subject to D.C. Code § 2-536 and should be proactively posted." *See* Def. Supp. Brief at 2.

LORs are "final opinions . . . made in the adjudication of cases." D.C. Code § 2-536 (3). As the Court previously explained, so long as personally identifying information is redacted, the LORS must be provided in response to the Plaintiff's FOIA request. *See* Order, May 25, 2023, at 8- 9. The District has argued they are in compliance with the Court's May 25th Order. *See* Def.

Supp. Brief at 2-3. Additionally, they concede that LORs should be posted under the statute. It is this concession that the Court finds controlling.

Even assuming that AJE did in fact "adjust" and reduce the number of requested LORs in their FOIA request, which the Court does not conclude it did, this would not affect the District's concession that it is obligated to proactively post redacted versions of the LORs. Since that obligation, which the District concedes, attaches even without a FOIA request, all redacted LORs encompassed in this litigation should be posted. [1] The Court will grant declaratory judgment that the District shall post redacted versions of all the LORs that fall within the Plaintiff's original request. The Court acknowledges that compliance with this Order may take some time. As set forth on the record, the District should take steps to post the additional LORs and be prepared to discuss the timeline to complete the required posting at the next status hearing.

The Plaintiff has also requested the Court dictate the labeling and location of the positing of the LORs on DCPS' website. *See* Plaintiff's Supp. Reply at 2. While the Court declines or order a specific title and/or location for the documents, the Court does find the District must comply with the purpose and intent of the reading room provision.

> It is clear beyond cavil that the reading-room provision has as its "primary objective [] the elimination of secret law." That is, "[t]he FOIA's reading-room provision 'represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law.'" And the requirement that certain categories of records be automatically published by the agency that produces them mitigates against the risk of secret law, insofar as it "prevent[s] an

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[1] Moving forward with disclosure, the District must only redact information that is considered PII under 34 C.F.R. § 99.31 – meaning that the District should not redact portions relating to the legal standard and conclusion – or information that would disclose the student to an outsider in the community. The District should provide the redacted LORs with the intent to maximize transparency.

See Order, May 25, 2023.

> agency from subjecting members of the public to a rule that the agency has not publicly announced."
>
> *Campaign for Accountability v. United States Gov't of Justice*, 486 F. Supp. 3d 424, 427 (D.D.C. 2020) (internal citations omitted).

Currently, the LORs are posted in a way that would not only require individuals to have specialized knowledge of the website, but also to have specialized knowledge of this case. The Court finds the current location and title to be contrary to the spirit of the reading room provision. The District should ensure the LORs are reasonably accessible to a member of the public without specialized knowledge of this case or specialized knowledge or skill as it relates to the DCPS disciplinary process.

II. <u>The District is not required to disclose PowerPoint and training materials that merely summarize the guidelines are already posted.</u>

Under D.C. Code §2-536,

> the following categories of information are specifically made public information, and do not require a request for written information: . . .
>
> **(2)** Administrative staff manuals and instructions to staff that affect a member of the public; . . .
>
> **(4)** Those statements of policy and interpretations of policy, acts, and rules which have been adopted by a public body.
>
> D.C. Code § 2-536 (a) (2), (4).

The District argues that the legislative history of FOIA suggests that Plaintiff's Exhibit 1 and 2 do not fall within the scope of documents subject to disclosure under the statute. *See* Def. Supp. Brief at 3-4; Plaintiff's Supp. Reply at 6. The District elaborates that since there are "existing policies and manuals" that have already been disclosed to the public, this summary document does not need to be disclosed. The Court agrees. Documents containing merely

summaries are not subject to required public disclosure. *See* Congressional Serial Set No. 13067-03. Based on the legislative history cited by the District and the plain language of the statute itself, the Court declines to order the posting of Exhibits 1 and 2. *See Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 136 (D.C. 2007) ("The first step in construing a statute is to read the language of the statute and construe its words according to their ordinary sense and plain meaning."); *James Parreco & Son v. District of Columbia Rental Hous. Comm'n*, 567 A.2d 43, 45 (D.C. 1989) ("In interpreting statute, we are mindful of the maxim that we must look first to its language; if the words are clear and unambiguous, we must give effect to its plain meaning.").

Plaintiff argues the statute requires the District to proactively upload these exhibits. However, Plaintiff cites to no case law, legislative history or law related to statutory construction that persuades this Court that this is so. The posting of the manuals and polices satisfy the law's prohibition against "secret law." If DCPS sought to use the PowerPoint as a basis for decision, they could only do so to the extent that it was consistent with the posted policies and manuals to which the public has access. *See* Plaintiff's Supp. Reply at 6-7. Plaintiff's contentions fail to take into account the legislative history suggesting the disclosures apply to "end products" and not summaries. Therefore, the Court finds the District is not required under D.C. Code § 2-536 to post Exhibits 1 and 2.

CONCLUSION

For the reasons stated above and good cause having been found, it is this 14th day of February 2024, hereby

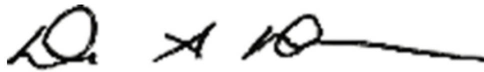
ORDERED that the Plaintiff's Motion for Partial Summary Judgment is **GRANTED in PART and DENIED in PART** as follows

1. The Plaintiff request for declaratory judgment is **GRANTED** insofar as the District has conceded that the redacted LORs that are the subject of the Plaintiff's requests, which the Court construes as applying to all redacted LORs requested in the Plaintiff's original FOIA request, should be posted pursuant to D. C. Code § 2-536 (a)(3), (5);
2. The redacted LORs shall be posted in a manner reasonably calculated to be accessible by a member of the public without specialized knowledge regarding this litigation or specialized knowledge or skill regarding the DCPS disciplinary process';
3. The District shall not be required to post Exhibits 1 and 2 to the Motion to the DCPS website; it is

FURTHER ORDERED that the parties shall appear for a status on April 19, 2024, at 10:30 a.m. at which time the District will report on the progress it has made with respect to posting the remaining redacted LORs; and it is

FURTHER ORDERED that the Plaintiff may submit a petition for attorney's fees for those portions of litigation on which it has prevailed on or before March 22, 2024. The District shall submit any opposition thereto by April 5, 2024.

SO ORDERED.



Danya A. Dayson
Associate Judge, Superior Court of the District of Columbia

Copies to:
All counsel of record